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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

Estate of JAMES J. NELSON, Deceased.	B234966
ALEX R. BORDEN, as Administrator, Petitioner and Respondent, v. PHYLLIS SHAW, Objector and Appellant.	(Los Angeles County Super. Ct. No. SWP023535)

APPEAL from an order of the Superior Court of Los Angeles County, Dudley W. Gray II, Judge. Affirmed.

Phyllis Shaw, in pro. per., for Objector and Appellant.

Borden Law Office, Alex R. Borden and Priya Bahl, for Petitioner and Respondent.

Phyllis Shaw appeals from an order settling a first and final account, allowing statutory attorney fees and commission, awarding compensation for extraordinary services, and directing final distribution of a will under which she is the only beneficiary. We find no basis for reversal and affirm.

FACTUAL AND PROCEDURAL SUMMARY

This is the second appeal to come before us arising from administration of this estate. In our first unpublished opinion, *Estate of Nelson* (Dec. 13, 2010, B208453) (*Nelson I*), we affirmed an order permanently suspending Shaw's powers as administrator of the probate estate, and appointing Alex R. Borden as successor administrator. We take some of our factual summary from our opinion in *Nelson I*.

Phyllis Shaw was appointed conservator for James J. Nelson in 1986. The same year, Mr. Nelson executed a holographic will naming Shaw as primary beneficiary. Mr. Nelson's son and brother, the only other beneficiaries under the will, were each to receive $1. It is undisputed that the only assets of the estate were four lots of improved commercial real property in Redondo Beach. Mr. Nelson also granted a general power of attorney to Shaw in 1986. He died in 1989. In 1990, his will was admitted to probate and Shaw was appointed administrator with will annexed. In October 1990, respondent Steven J. Cooper substituted in as Shaw's attorney in the probate proceeding.

Mr. Nelson's son brought an unsuccessful will contest. A jury found that, when the will was executed, Mr. Nelson was of sound and disposing mind and was not acting under the undue influence of Shaw. On July 18, 1991, the court executed an order denying the petition to revoke probate of the will. For the next 17 years, Shaw, as administrator, failed to take the necessary steps to close the Nelson estate.

In 2007, with a tax lien sale of the property imminent, two petitions were filed to remove Shaw as administrator of the estate. One was filed by Karen McDaniel, who claimed she had stored personal property, which Shaw refused to return, in a building on one of the properties. The second petition was filed by Shaw's former attorney,

Steven J. Cooper, who was a creditor of the Nelson estate for unpaid attorney fees. Cooper sought the appointment of Alex R. Borden as successor administrator.

On December 12, 2007, the probate court denied McDaniel's petition, suspended Shaw's powers, appointed Borden as special administrator, and ordered a new bond. The probate court granted Cooper's petition in April 2008, permanently suspended Shaw's powers as administrator, removed her as administrator, and ordered that she turn over all estate property to the successor administrator, Alex R. Borden. Borden was appointed administrator with will annexed in April 2008. Shaw appealed from the order removing her as administrator. In *Nelson I*, we affirmed the order on the ground that Shaw's removal was proper under Probate Code section 8502 in order to stop waste and mismanagement of the estate. The remittitur issued on February 14, 2011.

On March 29, 2011, Borden filed his first and final account and report, petition for settlement of the estate and for final distribution under the will (First and Final Account). He sought allowance of statutory attorney fees, commission, and compensation for extraordinary services. He reported that in March 2010, the real property owned by the estate was sold to the highest bidder for $650,000. This represented a gain on the sale of $110,000 over the appraised value. After the sale, the entire assets of the estate consisted of $339,915.14 in cash. Borden noted that Mr. Nelson's will left bequests of $1 each to his brother and son, both of whom post-deceased Mr. Nelson. Borden requested permission to abate the $1 bequests because the costs associated with identifying their heirs greatly outweighed the amount of the bequests.

Borden, who acted as his own attorney in pro. per. in administering the estate, sought a statutory commission of $21,006.67. He noted that Shaw had not filed a report with the probate court, and that his report necessarily covered the entire administration period, beginning in 1989. Borden also sought an additional $61,175.00 in compensation

for extraordinary services to the estate.[1] In addition, Borden sought payments to other attorneys who provided services to the estate. David Dantes was hired to evict Shaw from the real property and billed $2,855.00 for his services. Borden also sought statutory fees for services rendered to the estate by Cooper while Shaw was the administrator. The amount sought was $21,006.67. In addition, Borden requested $75,381.82 for Cooper's extraordinary attorney fees and costs. Scott P. Schomer was retained by Borden to represent Borden in a civil action filed against the estate and Borden during the course of the administration of the estate. The cost of his services was $9,197.50. Michael Carter Smith, who represented Shaw after Cooper substituted out in 2005, sought extraordinary fees in the amount of $12,300.00.

Shaw was notified of the hearing on the First and Final Account. She filed no written objection or response. She appeared at the hearing, but her attorney did not. On June 8, 2011, the probate court found that proper notice had been given and confirmed Borden's acts and transactions. Administration of the estate was closed. Payments were ordered as follows: to Cooper, a total of $96,388.49 ($21,006.67 in statutory fees plus $75,381.82 for extraordinary services); to Borden as successor administrator, a total of $82,181.67 ($21,006.67 statutory commission plus $61,175.00 for extraordinary services); to David Dantes, $2,855.00 for extraordinary legal services; to Scott P. Schomer, $9,197.50 for extraordinary legal services; and to Michael Carter Smith, $12,300.00 for extraordinary legal services to the estate.[2] The successor administrator

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[1] This figure was based on 175 hours of work at $350 per hour. (The actual total of that calculation is $61,250.00. The discrepancy is not explained, but since the figure sought and awarded is lower than the actual total, we disregard the minor discrepancy.)

[2] "Attorneys who probate estates are statutorily entitled to compensation based upon a sliding scale of percentages of the value of the estate. This fee is known as a 'statutory' or 'ordinary' fee for services rendered in the typical probate case. Attorneys may also be entitled to compensation for services which are not involved in the typical probate case. For unusual services, the probate court may allow additional compensation for extraordinary services. This is known as an 'extraordinary' fee." (*Estate of Gilkison*

was authorized to withhold a reserve of $15,000.00 to cover closing expenses of the administration, with the unused portion to be distributed to Shaw without further order. Cash in the amount of $121,992.48 (the net after payment of the statutory and extraordinary fees and commissions and the cash reserve) was to be paid to Shaw.

Nearly three weeks after the court's order approving the First and Final Account, Shaw moved to disqualify Cooper, Borden, Smith, Dantes, and Schomer, citing Code of Civil Procedure section 128[3]. The record on appeal does not indicate the disposition of that motion. The clerk's transcript also has an unconformed copy of a peremptory challenge to the trial court judge under Code of Civil Procedure section 170.6, signed by Shaw on June 28, 2011. The motion to disqualify the judge was denied as untimely. Shaw filed a timely appeal from the June 8, 2011 order.

DISCUSSION

Shaw is representing herself on appeal, but is held to the same standards as attorneys. (*Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543.) Her briefs are replete with accusations of criminal behavior, conspiracies, and ethical violations by Borden and the attorneys who were awarded fees in the order approving the First and Final Account. She devotes many pages to a recitation of perceived wrongdoing, starting in 1986. But, as we explain, Shaw failed to present her challenges at the hearing on the First and Final Account in the probate court. She provides no citation to either the record on appeal or to authority to support most of her contentions. In combination with the applicable standard of review, these omissions are fatal to her appeal.

We understand Shaw's primary argument on appeal to be that Borden and the attorneys should not have received any compensation for their work in the administration

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(1998) 65 Cal.App.4th 1443, 1446, fn. 1, (*Gilkison*), quoting *Estate of Hilton* (1996) 44 Cal.App.4th 890, 895.)

[3] Code of Civil Procedure section 128 codifies the inherent power of the courts to secure compliance with orders, punish contempt, and control proceedings. (*Vidrio v. Hernandez* (2009) 172 Cal.App.4th 1443, 1454–1455.)

of this estate. She also complains about the sale of the real property, which was confirmed by probate court order. Both orders are within the sound discretion of the probate court. "Apportionment of statutory fees and allowance of extraordinary fees are within the discretion of the probate court, whose determination will be upheld on appeal in the absence of a manifest abuse of discretion. [Citations.]" (*Estate of Heller* (1992) 7 Cal.App.4th 862, 864.) An order confirming a sale of real property belonging to an estate is affirmed if the probate court acted within its discretion in concluding the sale was for the best interest of the estate, and the order is supported by substantial evidence. (*Estate of Barthelmess* (1988) 198 Cal.App.3d 728, 736.) Shaw does not appear to raise any issue regarding other aspects of the First and Final Account or the order confirming it.

Before discussing specific issues, we resolve a more fundamental question. A number of Shaw's arguments reflect a basic misunderstanding of the probate process. For example, she repeatedly contends that no probate proceedings were required because the decedent, Mr. Nelson, gave her power of attorney and also made her the beneficiary of his estate under his holographic will. In addition, she argues that once the will contest was rejected, the probate case was closed and she automatically became owner of the real estate which was the only asset of Nelson's estate. From this she reasons that any probate proceedings which followed were unauthorized.

"'"Probate" is the court-supervised administration of a decedent's estate. It is an *in rem* proceeding over decedent's property in the state (the property being the "res"). [Citations.]' (Ross, Cal. Practice Guide: Probate (The Rutter Group 2007) ¶ 3:1, p. 3–1 (rev. # 1, 2006).) 'The probate court is concerned with passage of title to the decedent's property whether by will or by the laws of intestate succession. ([Prob. Code,] § 7000.) For this purpose "[t]he decedent's property is subject to administration under this code, except as otherwise provided by law." ([Prob. Code,] § 7001.) "The basic purposes of administering a decedent's estate are to preserve and protect the estate; to satisfy and discharge all debts and claims, including expenses of administration, that are charges or liens on the property; and to distribute the residue of the property, at a proper time, to

those persons who are entitled to receive it." [Citation.]' (*Estate of Jimenez* (1997) 56 Cal.App.4th 733, 740.) Thus, the '[a]dministration of an estate . . . involves ascertaining the nature, extent, and total value of the decedent's property and transferring it to the proper persons, who include creditors and taxing authorities as well as heirs. [Citation.]' (1 Cal. Decedent Estate Practice (Cont.Ed.Bar 2008) § 5.1, p. 5–3.) The duties of 'an executor or administrator in handling an estate . . . are to preserve and protect the estate, to satisfy and discharge all debts and claims and to distribute the residue of the property to those entitled to receive it.' (*Estate of Denman* (1979) 94 Cal.App.3d 289, 292.)" (*Estate of Bonanno* (2008) 165 Cal.App.4th 7, 17–18.)

Under these principles, once the will contest was denied, the probate of the estate resumed. Ownership of the property was not automatically conferred on Shaw, but could pass to her only by administration of the estate through probate. In addition, the power of attorney did not transfer Mr. Nelson's ownership of estate property to Shaw outside of probate. Generally, a power of attorney terminates on the death of the principal. (Prob. Code, § 4152, subd. (a)(4); *People v. Fenderson* (2010) 188 Cal.App.4th 625, 634.) In short, the probate court was authorized to conduct proceedings until the final closing of the Nelson estate.

A. Failure to Preserve Objections for Appeal

Although Shaw appeared at the hearing on the First and Final Account, she filed no written objections. Her attorney did not appear at the hearing. Shaw requested a continuance, but does not claim that she raised any other objection to the account. There is no reporter's transcript of the hearing in the record on appeal. Neither the minute order of June 8, 2011, nor the court's written order approving the First and Final Account suggests that Shaw raised any substantive objections at the hearing.

Division 3, Part 1, Chapter 3 of the Probate Code governs the hearing of all matters under the Probate Code, unless otherwise provided. (Prob. Code, § 1040.) Probate Code section 1043 provides that an interested person may object in writing at or before the hearing, or orally at the hearing. Probate Code section 11602, in the chapter on petitions for final distribution of the decedent's estate, provides: "The personal

representative or any interested person may oppose the petition." Since Probate Code section 11602 does not specify the manner in which objections are to be raised, we conclude that the general procedure set out in Probate Code section 1043 applies. (See Ross, Cal. Practice Guide: Probate (The Rutter Group 2011) [¶] 16:402, p. 16-121.)

If an interested party, such as Shaw, appears at the hearing on the First and Final Account and for distribution of the estate, but does not raise an objection, it may not be raised for the first time on appeal. In *Estate of Cooper* (1970) 11 Cal.App.3d 1114 (*Cooper*), the probate court approved the first and final account and directed final distribution of a decedent's estate. An adult son, one of the heirs under the will, appealed. He had filed written exceptions to the final account and petition for distribution, but expressly withdrew most of those exceptions in a joint pretrial statement. (*Id*. at pp. 1118–1119.) During trial, he abandoned a claim of undue influence, leaving only the decedent's competency to be decided. (*Id*. at p. 1119.) On appeal, the appellant attempted to resurrect the objections he had initially raised, but subsequently withdrew. The *Cooper* court cited extensive authority holding that an exception not raised in the court below may not be raised for the first time on appeal. (*Id*. at pp. 1122–1123; compare *Estate of Zabriskie* (1979) 96 Cal.App.3d 571, 575–576 [distinguishing cases where issues were waived by parties who appeared and participated in proceeding in probate court but failed to raise the issue from case in which party never participated in probate proceeding below].)

We conclude that Shaw failed to preserve her specific challenges to the First and Final Account and the order for distribution of the Nelson estate because they were not raised in the probate court.

B. Failure to Cite to the Record or to Authority

Shaw often purports to quote from statements made by probate court judges or by others. For example, according to Shaw, Judge Mark Wood said the case was "closed" after the jury returned a verdict rejecting the will contest. She cites no reporter's transcript in support of these assertions. The record on appeal in this case does not include a reporter's transcript of that, or any other proceeding, in the probate court. Any

claim which is not supported by a citation to the record on appeal (either the clerk's or reporter's transcript) is forfeited. (*Estates of Collins & Flowers* (2012) 205 Cal.App.4th 1238, 1251, fn. 11; *Estate of Kampen* (2011) 201 Cal.App.4th 971, 1001.) "'As a general rule, "The reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment." [Citations.] It is the duty of counsel to refer the reviewing court to the portion of the record which supports appellant's contentions on appeal. [Citation.] If no citation "is furnished on a particular point, the court may treat it as waived." [Citation.]' (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115.)" (*Lonely Maiden Productions, LLC v. GoldenTree Asset Management, LP* (2011) 201 Cal.App.4th 368, 384–385.)

The trial court's judgment is presumed to be correct, and it was Shaw's burden to prove otherwise by presenting legal authority or legally supported analysis on each point. (*Estate of Cairns* (2010) 188 Cal.App.4th 937, 949.) Conclusory arguments unsupported by citation to authority are forfeited. (*Ibid.*; see also *420 Caregivers, LLC v. City of Los Angeles* (2012) 207 Cal.App.4th 703, 732.)

For these reasons, we do not address Shaw's contentions not supported by citations to the record or to applicable authority.

C. Issues Not Raised In Opening Brief

In her reply brief, Shaw raises a number of issues for the first time which were not discussed in her opening brief. For example, she claims her Fourth Amendment rights were violated in the course of her eviction from the estate property after Borden succeeded her as administrator. She also claims her rights under the Eighth and Thirteenth Amendments were violated because she was forced to participate in the probate proceedings to protect her rights. Because claims were not previously raised, they may not be raised in the reply brief. (*Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335, 351, fn. 10 [declining to consider contention raised for the first time in reply brief]; *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894, fn. 10 [same].)

D. Conclusion

Shaw has failed to demonstrate a basis for reversal. She did not preserve her objections in the probate court. On appeal, she makes conclusory arguments unsupported by citation either to the record or authority. The authority she does cite, including various provisions of the United States Constitution and laws on human trafficking, among others, does not appear to have any application to this case.

We find no abuse of discretion. "The law with respect to the allowance of fees claimed for extraordinary services rendered in probate proceedings is well settled. The grant or denial of such fees is addressed to the sound discretion of the probate court. (Prob. Code, § 10811, subd.(a); *Estate of Trynin* (1989) 49 Cal.3d 868, 874; *Estate of Hilton* [(1996)] 44 Cal.App.4th 890, 914; *Estate of Downing* (1982) 134 Cal.App.3d 256, 266–267; see also 12 Witkin, Summary of Cal Law (9th ed. 1990) Wills and Probate, § 510, p. 531 ['The wide discretion of the probate court in the allowance and the amount of such fees will mostly be upheld.'])" (*Gilkison, supra*, 65 Cal.App.4th at p. 1148.) "'The appropriate [appellate] test for abuse of discretion is whether the trial court exceeded the bounds of reason.' [Citations.]" (*Id.* at p. 1449.)

The *Gilkison* court explained the limited role of a reviewing court in these circumstances: "A '. . . showing on appeal is wholly insufficient if it presents a state of facts, a consideration of which, for the purpose of judicial action, merely affords an opportunity for a difference of opinion. An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge. To be entitled to relief on appeal from the result of an alleged abuse of discretion it must clearly appear that the injury resulting from such a wrong is sufficiently grave to amount to a manifest miscarriage of justice . . . .' [Citation.] '"A judgment or order of the lower court is *presumed* correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error." (Citations.)' (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)" (*Gilkison, supra*, 65 Cal.App.4th at p. 1449.)

The record of this estate, including the appeal in *Estate of Nelson I* and this appeal, demonstrates that the probate court did not abuse its discretion in awarding extraordinary fees in its order of final distribution.

DISPOSITION

The order is affirmed. Respondent is to have his costs on appeal.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

SUZUKAWA, J.